No. 10236.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SAM KLEINMAN,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of ABRAHAM ZEMANSKY, DAVID ZEMANSKY and SOL ZEMANSKY, doing business under the fictitious name and style of PROVIDENT LOAN ASSOCIATION and STATE LOAN OFFICE, BANKRUPTS,

Appellee.

SUPPLEMENTAL BRIEF OF APPELLEE.

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Appellee.

SUPPLEMENTAL BRIEF OF APPELLEE.

In our Appellee's brief we discussed the invalidity of the purported security taken by Appellant in the light of the decision of the Supreme Court of the United States in the case of *Benedict v. Ratner*, 268 U. S. 353.

We now learn that Collier on Bankruptcy, 14th Edition recently out, has devoted several pages to an extensive discussion of the doctrine of *Benedict v. Ratner,* under Section 70-e of the National Bankruptcy Act. That portion of the discussion pertaining to assignment of accounts receivable (or choses in action as the pawn tickets are contended to be here), begins at page 1388, Volume 4.

Under Note 44, at page 1390, is cited a large number of cases wherein the Circuit Courts of Appeal throughout

the United States have followed the *Benedict v. Ratner* decision. We believe that a citation of these cases should be before the court, hence this short supplemental brief. They are:

Markovitz v. Taylor (C.C.A. 3rd Cir.), 94 Fed. (2d) 782, 36 Am. B. R. (N. S.) 1;

Lee v. The State Bank and Trust Co. (C.C.A. 2d Cir.), 38 Fed. (2d) 45, 15 Am. B. R. (N. S.) 317;

Union Trust Co. of Md. v. Peck (C.C.A. 4th Cir.), 16 Fed. (2d) 986, 9 Am. B. R. (N. S.) 127, certiorari denied 273 U. S. 767;

Blue v. Herkimer Natl. Bank (C.C.A. 2d Cir.), 30 Fed. (2d) 256, 13 Am. B. R. (N. S.) 416;

Matter of Borok (C.C.A. 2d Cir.), 50 Fed. (2d) 75, 18 Am. B. R. (N. S.) 270;

McCluer v. Heim-Overly Realty Co. (C.C.A. 8th Cir.), 71 Fed. (2d) 100, 25 Am. B. R. (N. S.) 656 (distinguishing case on the facts);

The City National Bank of Beaumont v. Zorn (C.C.A. 5th Cir.), 68 Fed. (2d) 566, 24 Am. B. R. (N. S.) 252.

Supplementing our citations of authority in Appellee's brief at page 41 on the question of the hostility of the law toward secret liens and charges on a debtor's property, to the detriment of general creditors, we wish to cite and quote the following extract from the decision of this Court in *Stepp v. McAdams,* 88 Fed. (2d) 925:

> "The law frowns upon secret charges against property. It is well established that equitable liens will not be enforced against creditors without notice, either actual or constructive.

In the leading case of Walker v. Brown, 165 U. S. 654, 664, 17 S. Ct. 453, 457, 41 L. Ed. 865, Mr. Justice White said: 'It is clear that if the express intention of the parties was to create an equitable lien upon the bonds or the value thereof, or if such intention arises by a necessary implication from the terms of the agreement, construed with reference to the situation of the parties at the time of the contract, and by the attendant circumstances, such equitable lien will be enforced by a court of equity against the bonds in the hands of Brown or against third persons who are volunteers *or have notice.*' (Italics ours.) See, also, Tobin v. Insurance Agency Co. C.C.A. 8), 80 F. (2d) 241, 243.

The rule in California accords with general law. As to chattel mortgages, which are dealt with in the California Civil Code in the title of 'Liens', §2957 of that compilation provides:

> 'A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value, unless:
>
> '1. It is accompanied by the affidavit of all the parties thereto that it is made in good faith and without any design to hinder, delay, or defraud creditors;
>
> '2. It is acknowledged or proved, certified, and recorded in like manner as grants of real property.'

Expounding the Code provisions relative to unrecorded transfers, mortgages, and liens affecting personal property, when unaccompanied by 'immediate delivery', the Supreme Court of California, in Ruggles v. Cannedy, 127 Cal. 290, 297, 53 P. 911,

913, 59 P. 827, 46 L. R. A. 371, said: 'The very object of them all—the reason for their being—*is to prevent secret liens upon and interests in personal property.* Says Chancellor Kent (2 Kent, Comm. 523): 'The policy of the law will not permit the owner of personal property to create an interest in another, either by mortgage or absolute sale, and still continue to be the visable owner. The law will not stop to inquire whether there was actual fraud or not, for it is against sound policy to suffer the vendor to remain in possession * * * It necessarily creates a *secret incumbrance* as to personal property, when to the world the vendor or mortgagor appears to be the owner, *and he gains credit as such,* and is enabled to practice deceit upon mankind.' (Italics ours.) See, also, Wolpert v. Gripton, 213 Cal. 474, 481, 2 P. (2d) 767; Merriman v. Martin, 113 Cal. App. 167, 175, 298 P. 95, petition for hearing denied by the Supreme Court of California on May 28, 1931; 16 Cal. Juris 340, §39.

We therefore hold that, in the absence of a showing of the recordation of the contract of November 25, 1929, or of actual notice of such contract brought home to the Elmer Company's other creditors, such contract did not create an equitable lien, enforceable as against such other creditors, upon the proceeds from the oil produced by the wells named therein."

Dated: March 12, 1943.

Respectfully submitted,

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